Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-405

NOGALES SERVICE CENTER,
an Arizona corporation,

Petitioner,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

MICHAEL J. MEEHAN
Post Office Box 2268
Tucson, Arizona 85702
Attorneys for Petitioner

MOLLOY, JONES, DONAHUE, TRACHTA
& CHILDERS, P.C.
21st Floor, Arizona Bank Plaza
Post Office Box 2268
Tucson, Arizona 85702

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

NOGALES SERVICE CENTER petitions for a Writ of Certiorari to review the judgment of the Court of Appeals, State of Arizona, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the Arizona Supreme Court, denying review in this case, was entered on June 13, 1978 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the courts of general jurisdiction of the various states are precluded by Federal decisional or statutory law from entertaining private actions seeking damages for violations of the antitrust laws of the United States.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §15, 38 Stat. 731:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

Petitioner, Nogales Service Center, is a retail truck stop operator in Nogales, Arizona, which purchases its gasoline

and diesel fuel requirements from Respondent, Atlantic Richfield Company. In 1975, Nogales Service Center filed an action against the Company in the United States District Court for the District of Arizona, alleging that the Company had violated the Sherman Act, the Robinson-Patman Act, the Arizona Uniform State Antitrust Act, and had breached a contract by which the Company had agreed to price its product to Nogales Service Center on a competitive basis, thereby damaging Nogales Service Center by several hundreds of thousands of dollars.

Petitioner was heavily indebted to the Company for a capital improvement loan that enabled it to construct the truck stop facilities it operates. In April of 1976, the Company instituted an action of foreclosure in the Santa Cruz County Superior Court, declining to plead its claim in the Federal Court as a counterclaim to Plaintiff's action. Service Center, both by way of affirmative defense and as counterclaims, pleaded each of the contract, State and Federal Antitrust Act claims previously asserted in the action in the United States District Court.

The Company obtained a summary judgment foreclosing its realty and chattel mortgages upon the assets of Service Center and, at the same time, moved for and was granted dismissal of the Federal antitrust claims in Service Center's Counterclaim on the ground that the State trial court lacked subject matter jurisdiction of Federal antitrust claims. Service Center had argued before the trial judge that the private action section of the Sherman Act[1] and of the Clayton Act[2] were not intended by Congress to vest

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[1]Sherman Act, §7 26 Stat. 210.

[2]Clayton Act, §5, 38 Stat. 731, 15 U.S.C. §15.

exclusive subject matter jurisdiction in the Federal courts, or private actions under the Federal antitrust laws.

Both the trial court and the Arizona Court of Appeals agreed that, notwithstanding Congressional history to the contrary, dictum from *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943), precluded the exercise by a state court of jurisdiction over Federal antitrust claims. The Arizona Court of Appeals concluded that the statement in *Freeman* was "not supported by any judicial reasoning, but apparently was based upon a casual reference to 15 U.S.C., paragraph 15" and that the Congressional history of the Act was never considered by this Court. (App. A, *infra.*) It thus affirmed dismissal of Service Center's claims for lack of subject matter. The Arizona Supreme Court declined review. (App. B, *infra.*)

REASONS FOR GRANTING THE WRIT

In 1920, Mr. Justice Day wrote an opinion for the Court in *Blumenstock Brothers Advertising Agency v. Curtis Publishing Company*, 252 U.S. 436 (1920). In the course of holding that an antitrust case filed in a United States District Court alleged sufficient transactions in interstate commerce to plead a substantial Federal claim, Justice Day wrote that an action under the Sherman Act "is wholly statutory, and can only be brought in a District Court of the United States". 252 U.S. at 440. This statement was wholly superfluous dictum, unnecessary to the judgment or opinion, and made without consideration of the statute.

In 1943, Mr. Justice Douglas authored *Freeman v. Bee Machine Co., Inc.*, 319 U.S. 448 (1943). It held that a

defendant in a case removed to a United States District Court on grounds of diversity was found in that District for purposes of venue in the bringing of an antitrust claim. In the course of that opinion, Justice Douglas stated in footnote 6, 319 U.S. at 451, that a state court did not have jurisdiction over a cause of action under the antitrust laws. This statement was wholly unnecessary to the decision of the *Freeman* case.

On the basis of the dicta of *Blumenstock* and *Freeman*, courts have held, as did the court below in this case, that Federal antitrust claims could not be brought in a state court. Yet, Congress clearly intended for the courts of the states to have concurrent jurisdiction with those of the Federal Court, over such claims.

When the Senate was debating §7 of the Sherman Act, an amendment to spell out the right of a litigant to sue in a state court was defeated because the Senate believed the section already allowed suits in a state court. As Senator Edmunds stated on the floor of the Senate:

> "It leaves everybody, as everybody now has the power under any law of the United States, to sue anybody who wrongs him, whether against the law of the state or of the United States, in a state court if he chooses to do so." *Bills and Debates in Congress Relating to Trusts*, S. Doc. No. 147, 57th Congress, 2d Sess., p.316 (1903).[3]

The quoted statement was not simply a casual reference, but a considered position. Senator Edmund continued later in the debate:

> "I repeat that this section was intended by the Committee on the Judiciary to allow anybody who wished, to sue in a court of the United States without

[3]Hereinafter cited as "S. Doc. 174".

> regard to the $2,000.00 limitation, leaving to any man the original right to sue anybody that offended him in the courts of his own state and the courts of his own county." S. Doc. No. 174, p. 317.

And, further,

> "[T]he language is an authority that the man 'may sue in the circuit court of the United States' without regard to the amount in controversy. It is not intended and designed by a long settled line of decisions to exclude the jurisdiction of the courts of the states." *Ibid.*

Relating to the same §7, debate in the House indicated the same understanding. Representative Culbertson on the floor of the House said that to construe §7 to limit jurisdiction to the courts of the United States would be "a misconstruction". S. Doc. 147, p. 333. Representative Culbertson repeated the understanding that state court jurisdiction was to be left open to private litigants under §7:

> "If Congress had declared that the Circuit Court should have exclusive jurisdiction over these subjects, then as a matter of course, the state courts would be deprived of any right or power under the laws of the several states to entertain jurisdiction of any case of this character. But it is simply provided that the Circuit Court shall have jurisdiction without regard to the amount, leaving the state courts open to every person who may desire to go into them to recover actual damages." S. Doc. No. 174, p. 334.

When, in 1914 Congress adopted the Clayton Act, §5 replaced Sherman Act §7. The legislators again understood that concurrent jurisdiction was being allowed. *See* the remarks of Congressman Scott, 51 Congressional Record 9417, commenting that a private plaintiff could sue in the courts of the states.

It is, of course, an elementary proposition that "unless the Congress expressly makes Federal court jurisdiction exclusive, Federal and state courts have concurrent jurisdiction to try Federal claims". 13 Wright, Miller and Cooper *Federal Practice & Procedure*, §3527, p. 124. The statute itself says that a litigant "may" sue in the Federal courts but does not require them to do so. And, Congress is able to state clearly its intention that Federal jurisdiction be exclusive. For example, *see* 28 U.S.C. §1338, vesting in the district courts jurisdiction of patent and copyright disputes, and saying that "such jurisdiction shall be exclusive of the courts of the state". 28 U.S.C. §1338.

The question of whether private actions under the Federal antitrust laws have been mistakenly restricted to the district courts is of great moment. If the dicta of Justices Day and Douglas should no longer be followed, the district courts may no longer have to shoulder alone the burden of from thirteen to sixteen hundred private, civil antitrust actions filed each year.[4]

There is no reason to limit adjudication of private actions, to the courts of the United States.

In recent years, enforcement by the states of the antitrust laws, including state laws, has grown phenomenally. Where cases typically combine pleading of a Federal claim with claims arising under state antitrust laws, the courts of the states are deprived of an opportunity to shape the course of their own state antitrust laws, by the requirement that any case which contains a Federal claim be brought in a Federal court. Elimination of this restriction may help to

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[4] *See* the *1977 Annual Report of the Director of the Administrative Office of the U.S. Courts*, reporting that in 1975 there were 1375 civil antitrust actions filed in the district courts; 1504 in 1976 and 1611 in 1977.

restore "the proper jurisdictional balance between the Federal and the state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism". Burger, "*Has the Time Come*", 55 F.R.D. 119, 121 (quoting the ALI study on Division of Jurisdiction Between State and Federal Courts).

Elimination of the dictum precluding state courts from hearing Federal antitrust claims will also serve the purposes of judicial economy. Just as, before *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938), litigants were encouraged to shop between state and Federal forums by the existence of different substantive law, antitrust litigants may seek, or avoid, the district courts because of the availability of Federal antitrust claims in the district court, or the fact that they cannot be subjected to Federal antitrust claims in the courts of the states. In fact, this case involved considerations of this kind. The dispute between the parties was begun in the District Court of Arizona. The Company brought its foreclosure action in the state court, knowing both that it could proceed to judgment before the Federal court, burdened with extensive criminal narcotics cases, could hear the case, and also that it could not be sued in return, in the state action, under the Federal Antitrust Act. Because of the dicta in *Freeman* and *Blumenstock*, there are now pending two actions where one should have sufficed.

The issue raised by this case, while substantial in its implications for the division between state and Federal courts, and the multiplicity of litigation, would disturb virtually no vested rights, nor upset any established expectations. It would simply open up a new procedure for resolving these claims. There is, therefore, little reason that

the dicta of *Freeman* and *Blumenstock* should not be reversed, so that this case and many others will be decided upon their merits, and not upon the "uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice". Erickson *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277.

CONCLUSION

For the reasons stated, it is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be granted.

MICHAEL J. MEEHAN
Post Office Box 2268
Tucson, Arizona 85702
Attorney for Petitioner

September, 1978

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
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CLERK COURT OF APPEALS
Division Two

NOGALES SERVICE CENTER, formerly known as NOGALES TRUCK TERMINAL, INC., an Arizona corporation,

Appellant,

v.

ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation,

Appellee.

2 CA-CIV 2772

OPINION

Appeal from the Superior Court of Santa Cruz County
Honorable Gordon Farley, Judge
Cause No. 8151
AFFIRMED

Molloy, Jones, Donahue, Trachta & Childers, P.C.
by Michael J. Meehan
Attorneys for Appellant — Tuscon

Lesher, Kimble & Rucker, P. C.
by Robert O. Lesher
Attorneys for Appellee — Tucson

RICHMOND, Chief Judge

This is an appeal from a partial summary judgment of foreclosure entered during the pendency of appellant's counterclaim, and from dismissal of three counts of the counterclaim asserting federal antitrust claims. Judgment was entered pursuant to 16 A.R.S. Rules of Civil Procedure, Rule 54(b). We find no error and affirm.

In 1969, Atlantic Richfield Company (Arco), a refiner and marketer of petroleum products, loaned $300,000 to appellant for construction, supply and operation of its truck and automobile service station facility in Nogales. Appellant executed and delivered a promissory note, secured by realty mortgage, and a security agreement covering appellant's inventory and accounts receivable. On the same date the parties entered into a product agreement requiring appellant to purchase not less than 50 percent of all of its fuel requirements from Arco for a term of 15 years. Arco subsequently perfected its security interest in the inventory and accounts receivable.

In early 1973 an additional $100,000 was loaned to appellant by Arco. Appellant executed and delivered another promissory note.

In 1976 Arco commenced this action, alleging in separate counts that the promissory notes were subject to acceleration because payments were delinquent, and seeking foreclosure of the mortgage and delivery of the personal property and accounts receivable covered by the security agreement.

In its answer, appellant alleged that its obligations to Arco were "subject to, reduced and eliminated by an offset in the amount and upon the claims pleaded" in an accompanying counterclaim. It further alleged that the loan agreement upon which Arco's claims were based was void

and unenforceable, being in violation of the Arizona Antitrust Act. The first three counts of the counterclaim, which subsequently were dismissed by the trial court on Arco's motion, alleged violations of the Robinson-Patman Act and Sherman Act. The fourth count alleged violation of Arizona antitrust statutes, and the fifth count sought damages for breach of contract.

In the contract count, appellant alleged that in late June or July of 1972, Arco had induced appellant to borrow the $100,000 evidenced by the second promissory note for construction of major additions to its truck stop facilities by agreeing to certain discounts on diesel fuel, but that after delivery of appellant's promissory note in February 1973, Arco had filed and refused to establish the discounts. As a result, it alleged, appellant was unable to compete successfully with other retailers and had sustained damages in excess of $400,000. On deposition and at an evidentiary hearing on Arco's motion for partial summary judgment, William J. Terpening, appellant's president and a principal shareholder, admitted that the notes were delinquent but testified that he had computed damages of $890,000 as a result of Arco's breach of its agreement, based on appellant's profit margin per gallon and the projected gallonage it had expected to sell at competitive prices under the discount agreement.

This court recently held that a claim for unliquidated damages, absent some special equity in the pleader's favor, will not avoid a judgment of foreclosure. Nutter v. Occidental Petroleum Land and Development Corporation, _____ Ariz. _____, 573 P.2d 532 (1977). Terpening's computation of appellant's damages based on projected gallonage does not render appellant's claim

liquidated. *See* Costanzo v. Stewart Title & Trust of Phoenix, 23 Ariz. App. 313, 533 P.2d 73 (1975). The following language from *Nutter* seems equally applicable here:

> "The situation between the parties is not such that justice cannot otherwise be done. In the absence of an allegation of [Arco's] insolvency or other special equity that would render it probable that the [appellant] would lose [its] demand and be compelled to pay the demand of [Arco], the general rule applies and the [appellant] cannot set off a personal demand for unliquidated damages against the mortgage debt." 573 P.2d at 534.

Appellant argues that in any event it has presented a defense of recoupment, precluding summary judgment whether or not its claim is liquidated. W. J. Kroeger Co. v. Travelers Indemnity Co., 112 Ariz. 285, 541 P.2d 385 (1975). Recoupment is confined to the contract on which plaintiff sues, whereas setoffs generally include all mutual debts and liabilities. Crow v. Mothers Beautiful Co., 115 Ga. App. 747, 156 S.E.2d 193, 194 (1967). Appellant has not alleged fraud in the inducement, which would preclude summary judgment on the secured promissory notes if supported by evidence raising material issues of fact. *See* Light v. Chandler Improvement Co., 33 Ariz. 101, 261 P. 969 (1928). The alleged breach of contract and antitrust violations are extrinsic to the promissory notes and as such do not invoke the principles of recoupment.

Based on the foregoing, we find no abuse of discretion to the trial court's entry of judgment of foreclosure under Rule 54(b).

In its minute entry dismissing the federal antitrust claims, the court stated:

> "The Court finds that the Motion to Dismiss is appropriate in the light of the case of Freeman v. Bee

Machinery Company, [139 U.S. 448, 63 S. Ct. 1146 (1943)] although the statement by the majority and minority opinions that 'actions under the Sherman Act are exclusively vested in the U.S. District Court' was not supported by any judicial reasoning, but apparently was based upon a casual reference to 15 USC, Paragraph 15 and the point raised by the Defendant that the Congressional history of the Act would not warrant such a statement was never considered by the Court. However, it would be an exercise in futility for this Court to fly in the face of the statement of both the majority and minority opinion in that case."

We are unable to gainsay the trial court. Although dictum in *Freeman*, the statement that state courts lack subject matter jurisdiction of actions for violation of the federal antitrust laws has since appeared in a number of cases decided by lesser federal courts. *See, e.g.*, State of Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972). Further, the record discloses that the identical claims were the subject of an action commenced by appellant and Terpening against Arco in United States District Court, which was pending at the time Arco commenced its action for foreclosure in superior court. We find no error in dismissal of the federal antitrust claims.

Affirmed.

JAMES L. RICHMOND, Chief Judge

CONCURRING:

LAWRENCE HOWARD, Judge

JAMES D. HATHAWAY, Judge

APPENDIX B

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

June 14, 1978

NOGALES SERVICE CENTER, formerly known as NOGALES TRUCK TERMINAL, INC., an Arizona corporation, Appellant, vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, Appellee.	Supreme Court No. 13800-PR Court of Appeals No. 2 CA-CIV 2772 Santa Cruz County No. 8151

The following action was taken by the Supreme Court of the State of Arizona on June 13, 1978 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 14th day of June, 1978.

RECEIVED

JUN 16 1978

MOLLOY, JONES, DONAHUE, TRACHTA & CHILDERS, P.C.

Reviewed: yes
Doc: no
Date 6/16/78
By

CLIFFORD H. WARD, Clerk

By Kathleen E. Kempley
Deputy Clerk

TO: Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta & Childers, Arizona Bank Plaza, P.O. Box 2268, Tucson, Arizona 85702

Robert O. Lesher, Esq., Lesher, Kimble & Rucker, 3773 East Broadway, Tucson, Arizona 85716

Hon. Gordon Farley, Judge, Santa Cruz County Superior Court, Santa Cruz County Courthouse, Nogales, Arizona 85621

Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

Supreme Court, U. S.
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

ROBERT O. LESHER
3773 East Broadway
Tucson, Arizona 85716

ELLIOTT J. HAHN
Legal Division
Atlantic Richfield Company
Box 2679 - T.A.
Los Angeles, California 90051

Attorneys for Respondent

LESHER, KIMBLE & RUCKER, P.C.
3773 East Broadway
Tucson, Arizona 85716

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

THE QUESTION PRESENTED

Do state courts have jurisdiction to entertain suits founded on the federal antitrust laws?

STATEMENT

The respondent, Atlantic Richfield Company (called "ARCO" hereafter), sued petitioner Nogales Service Center (hereafter called "Center") to foreclose a realty

mortgage. The action was filed in the Superior Court of Arizona in Santa Cruz County. The Center counterclaimed for damages from ARCO's asserted violations of the anti-trust laws of the United States and of Arizona. On ARCO's motion the trial court dismissed as beyond its jurisdiction those claims based on the federal statutes. The Center appealed; the Arizona Court of Appeals affirmed; and the Supreme Court of Arizona denied review. This Petition followed.

ARGUMENT

"It is undesirable to believe a proposition when there is no ground whatever for supposing it to be true."*

To the assertion that state courts have the jurisdiction claimed for them in the Petition, four answers are available.

There is no support for the proposition to be found in case law.

There is no support for it in scholarly writing.

This Court has rejected it for over fifty years, and Congress has lived happily with the rejection.

To advance the proposition is to ignore fundamental considerations of public policy and to invite both chaos in the law and an even greater burden of judicial review by this Court.

The Petition admits two opinions of this Court as the source of the now widely-accepted principle that cases brought under federal antitrust laws must be brought in the federal courts. *Blumenstock Brothers Advertising Agency v. Curtis Publishing Company,* 252 U.S. 436 (1920), and

*Russell, *The Doctrine of Rational Scepticism.*

Freeman v. Bee, Inc., 319 U.S. 448 (1943), state precisely that rule. The Center, however, dismisses those announcements of the law as dicta. But their common dictum has stood - and been understood - as law for fifty-eight years. And those lower courts that have adopted it have done so in ruling squarely on the question. Petitioner ignores the now numerous cases in which the assertion of state court jurisdiction has been rejected. They include:

Englehardt v. Bell & Howell Co., 327 F.2d 30.

Cream Top Creamery v. Dean Milk Company, 383 F.2d 358.

Hand v. Kansas City Southern Railway Co., 55 F.2d 712.

State of Washington v. American League of Professional Baseball Clubs, 460 F.2d 654.

Gold Fuel Service, Inc. v. Esson Standard Oil Co., 32 N.J. 459, 161 A.2d 246, cert. den. 364 U.S. 882.

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Overseas Motors, Inc. v. Import Motors, Ltd., Inc., 375 F.Supp. 499, aff'd. 519 F.2d 119, cert. den. 423 U.S. 987.

The list is illustrative, not exhaustive. (Other cases are collected at 15 U.S.C.A. §15, notes 424 and 425.)

The proposition is now so clear a part of settled law that this Court as recently as last year has stated it without extended exposition. In *Vendco Co. v. Lektro-Vend Corp.,* 433 U.S. 623 (1977), the court held:

> "The private action for damages conferred by the Clayton Act is a 'uniquely federal right of remedy,' in that actions based upon it may be brought only in the federal courts." (433 U.S. at 632)

And four members of this court, although dissenting, agreed that:

> "Congress has granted the federal courts exclusive jurisdiction over the prosecution of private antitrust litigation." (Stevens, J., 433 U.S. at 664)

Further, 15 U.S.C. §15 is not the only jurisdictional statute germane to the issue. When the Clayton Act was adopted, its Section 16 became what is now 15 U.S.C. §26, which presently reads, in applicable part:

> "Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ."

The Center here contends that by failing specifically in 15 U.S.C. §15 to deny state court jurisdiction Congress has granted that jurisdiction. There is no such express denial of state jurisdiction in §26, either. Yet this Court has squarely held that the federal court's jurisdiction under §26 is exclusive. Two years after *Blumenstock,* in *General Investment Co. v. Lake Shore & M. S. R. Co.,* 260 U.S. 261 (1922), Justice Van Devanter posed the question for decision this way:

> "Was plaintiff entitled to sue under the Sherman Anti-Trust Act and the Clayton Act, and, if so, could that right be exercised through a suit brought in a state court?" (260 U.S. at 286)

Having answered affirmatively the first question, this Court (260 U.S. at 287) answered the second:

> "This right to sue, however, is granted in terms which show that it is to be exercised only in a 'court of the United States.' This suit was brought in a state court, and, in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act, that court could not entertain it. The situation was the same in respect of the purpose to enjoin a violation of the Clayton Act."

Unable to support its claim with case law, the Center has sought the help of scholarly texts. It has, however, chosen strangely from among them. On Page 7 of its Petition it has cited Wright, Miller and Cooper, *Federal Practice & Procedure,* as sustaining its position. What those authors *really* say is said clearly:

> "If the Congress creates a cause of action, it may require that the substantive right be prosecuted exclusively in the federal courts, *as the Congress has done in the context of antitrust . . .*" §3527, p. 123. (emphasis ours)

The cases and the scholars, to be sure, are not the primary source of the rule. That source is the statute itself. One injured by antitrust violations "may sue therefor in any district court of the United States . . ." (15 U.S.C. §15). Had Congress meant to provide for state jurisdiction concurrent with that of the federal courts, it knew how to do so. It has done so, for example, in areas of bankruptcy, in the Federal Employers Liability Act and elsewhere. It did not do so here.

The selectively excerpted legislative history of the controlling statute is no help to the Center. This Court may and sometimes will search out legislative history for material reflecting Congress' intent in a legal area otherwise obscure. The truth is, however, that there is simply no such thing as "legislative intent" except as it is made manifest in the language of the statute. There are, instead, only individual intents, each lawmaker being entitled to his own, and some informing themselves sufficiently to possess them. This Court has long ago recognized that

> "These statements of the author of the Act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning."

Jennison v. Kirk, 98 U.S. 453. Thus, even if the Senator

(Edmund) and the Congressman (Culbertson), on whose pronouncements the Center here depends, were in truth the authors of 15 U.S.C. §15, those pronouncements before its enactment cannot control its construction. Many things are said, pro and con, before the enactment of a statute. It would be an invitation to chaos to permit state and lower federal courts to seek out solutions to statutory problems in the quagmire of the Congressional Record when this Court's own clear solutions to those problems lie close to hand.

But if, indeed, Congress' intent with respect to the statute has importance of its own, apart from the words themselves which Congress chose to use, that intent is clear enough. When Justice Day wrote, in 1920, that an action under the antitrust laws of the United States "can only be brought in a District Court of the United States" (*Blumenstock, supra*), his words, dicta or not, were perfectly clear English. They left no question of this Court's view of the matter. When Justice Douglas wrote (*Freeman, supra*) that a state court did not have jurisdiction over a cause of action under the federal antitrust laws, lawyers may have argued that his pronouncement was a dictum, but is there any conceivable question about what he meant? Congress has been informed of the views of this Court on this question for fifty-eight years. It has known that long that in this Court's view the jurisdiction of the District Courts over these cases was exclusive. And it has done nothing. It has accepted that rule without even once, so far as is recorded, entertaining an amendment of the statute that would change it.

History is as compelling an argument against the Center's position as is the statute itself.

There is still another. The statute as it has been uniformly read over a half a century serves a real and useful public purpose. Implicit in the very fact of federal antitrust

legislation is the requirement that it be applied and enforced uniformly across the nation. That requirement of uniformity suggests in its turn the necessary restriction of jurisdiction to courts of a single system, the federal. The fifty states, possessing their own separate courts almost without number, are badly situated to provide a common, nationwide and uniform enforcement of the federal laws.

As the earlier quoted dissent in *Vendo Co. v. Lektro-Vend Corp., supra,* points out:

> "The Illinois decision on the merits merely highlights the fact that state and federal courts apply significantly different standards in evaluating contracts in restraint of trade." (433 U.S. at 663)

To be sure, this Court sits to correct their errors and to impose, finally, the uniformity indispensable to the federal scheme. ARCO suggests, however, that the checkered history of review of FELA cases, and a recognition of the demands which that Act, with its provision for concurrent jurisdiction, has imposed on this Court, should surely argue against creating that same concurrent jurisdiction here.

The Center argues that such an expansion of antitrust jurisdiction would afford relief to the admittedly hard-pressed District Courts. Nothing in modern American experience justifies any such optimism. Lawsuits expand to fill the courts available to hear them. It is far more likely that the judicial grant of antitrust jurisdiction to state courts would simply produce more antitrust actions, all of them ultimately the appellate responsibility of this Court.

The question raised by the Center's petition is not an open one, and has not been for more than half a century. When this Court has spoken as clearly to the statute's meaning as it spoke in *Blumenstock, Freeman* and *General Investment Co.*, its pronouncements have become operative parts of the

statute itself. Congress, the appropriate body to change the rule, has shown over all that period no disposition to do so. Jurisdiction over cases brought under the federal antitrust laws is in the federal courts. By statute, by case law, by scholarly authority that jurisdiction is exclusive, and by compelling public policy it should remain so.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT O. LESHER
3773 East Broadway
Tucson, Arizona 85716

ELLIOTT J. HAHN
Legal Division
Atlantic Richfield Company
Box 2679 - T.A.
Los Angeles, California 90051

Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-405

NOGALES SERVICE CENTER,
an Arizona corporation,

Petitioner,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,

Respondent.

PETITIONER'S REPLY BRIEF ON CERTIORARI

MICHAEL J. MEEHAN
Post Office Box 2268
Tucson, Arizona 85702
Attorneys for Petitioner

MOLLOY, JONES, DONAHUE, TRACHTA
& CHILDERS, P.C.
21st Floor, Arizona Bank Plaza
Post Office Box 2268
Tucson, Arizona 85702

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ARGUMENT

The respondent ARCO would have this court believe that State Courts are precluded from concurrent jurisdiction over antitrust suits because "had Congress meant to provide for [such concurrent jurisdiction] it knew how to do so". Brief in Opposition, p. 5. Of course, it has stated the inverse of the rule for determining concurrent jurisdiction. In fact, concurrent jurisdiction is the "common phenomenon in our judicial history" and exclusive jurisdiction is only declared, where Congress has excluded jurisdiction of State Courts "by express provision". *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 508 (1962).

The respondent company would have this court believe

that legislative history such as remarks in debate by sponsors, floor managers, and drafters of a bill are inappropriate indications of the meaning of an ambiguous statute. This contention rests upon an incomplete quotation, the whole of which stands for something quite different than ARCO contends. The portion omitted by ARCO is shown in brackets:

> "These statements of the author of the Act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning. [; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, *and thus served to indicate the probable intention of Congress in the passage of the Act*]". *Jennison v. Kirk*, 98 U.S. 453, 459, 460 (1878) (emphasis added).

Legislative history is unnecessary where the meaning of a statute is unambiguous. In this case, Congress has said that a private claimant "may sue [for a violation of the Sherman Act] in any District Court of the United States . . ." 15 U.S.C. §15. Just as this court held in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), 29 U.S.C. §185 that concurrent jurisdiction was intended by Congress saying that suit "may be brought in any District Court", so, too, this statute unambiguously intends the same result.[1]

[1] *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) is uniquely instructive of the proper disposition of this case. There, the "may sue" statutory language was used. This Court, Mr. Justice Stewart, first described the pertinent principles of concurrent and exclusive jurisdiction. The opinion then canvasses legislative history very similar to that existing for the Sherman and Clayton Acts, on the question of concurrent jurisdiction. The statute's language was all but identical with that at issue here. The Court recognized that the substantive law involved was to be the unique Federal Labor Law. But the language of the statute and the history as derived from floor managers' debates mandated a finding of concurrent jurisdiction. It is just this analysis that has never been undertaken as to the Sherman Act, which we now ask the Court to undertake.

But if any doubt there be, the legislative history makes plain the intended concurrent jurisdiction. Such legislative history has, of course, been appropriate source of the meaning of the statute. *E.g., Federal Energy Administrator v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *United States v. City and County of San Francisco*, 310 U.S. 16 (1940); *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir. 1962). ARCO's argument to the contrary, on the basis of one misleading citation, is frivolous. Indeed, ARCO has never disagreed, through proceedings in the trial court and at three appellate levels, that Congress intended for the courts of the States and the United States to have concurrent jurisdiction.[2]

Instead it has argued that this meaning should be ignored and the dictum of *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943) and *Blumenstock Brothers Advertising Agency v. Curtis Publishing Company*, 252 U.S. 436 (1970) should be blindly followed.

ARCO would have this court believe that the eight cases cited on page 3 of its brief contradict the statutory meaning urged by the petitioner. In fact, in seven of the eight cases the *Blumenstock* or *Freeman v. Bee* dicta were accepted incidentally to deciding other issues, and were not directly litigated. In an eighth, the refusal of state court jurisdiction was mentioned without any supporting citation or analysis.

Of the four denials of certiorari reported by ARCO on page 3, none presented to this court the issue framed by this

[2] Its contention, Brief, p. 5, that legislative history has been "selectively excerpted" is puzzling. It knows that extensive additional legislative history was presented in the courts below, from which excerpts were included in the petition to serve merely as an example. It has never disagreed with the legislative history presented, and its import.

case.[3]

This Court's reference to exclusive federal jurisdiction for Sherman Act claims, in *Vendco Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) was again premised, both in the plurality opinion of Mr. Justice Rehnquist and the dissent of Mr. Justice Stevens, upon the *Freeman v. Bee Machine Co., supra,* dicta. *Vendco* demonstrates the benefit of reconsidering the exclusive jurisdiction dicta. Had the Illinois Court been able to consider federal antitrust violations by way of affirmative defense or counterclaim, this court would never have had to decide whether an injunction could issue by the District Court, to restrain collection of the Illinois judgment. Instead, the antitrust claims would not have been abandoned in the state court suit, and a second round of litigation in the District Court would have been avoided, as would the need for this court to address the delicate and highly technical Anti-Injunction Act issues, without sacrificing the concerns of the *Vendco* dissenters that the antitrust act be made fully effective.

This court said, in *General Investment Co. v. Lakeshore and M.S.R. Co.*, 260 U.S. 261 (1922) that 15 U.S.C. §26, respecting jurisdiction in private antitrust actions for

[3]In *North Carolina v. Charles Pfeiser and Co., Inc.* No. 75-1801, *cert. denied,* 429 U.S. 870 and *Overseas Motors Inc. v. Import Motors Ltd., Inc.*, No. 75-494, *cert. denied,* 423 U.S. 987, the issue of concurrent jurisdiction was not raised in any way. In *Westinghouse Electric and Manufacturing Co. v. McGregor,* No. 373 O.T. 1944, certiorari was denied for lack of a final judgment. 323 U.S. 761. In *Gold Fuel Service Inc. v. Essons Standard Oil Co.*, No. 361 O.T. 1960, *cert. denied,* 364 U.S. 882, the issue was seemingly raised by the questions presented in the petition, but actually was argued as an attempt to modify State Common law by incorporating Sherman Act principles; a posture that would deprive this court of jurisdiction to review the State Court opinion.

injunctive relief, reposed exclusive jurisdiction in the Federal Courts for such actions. Like *Freeman v. Bee Machine Co., supra,* and *Blumenstock, supra,* the opinion of Justice Van deVanter was devoid of any analysis whatsoever, either of the language of the statute, of the legislative history, or of the rules of construction for deciding exclusive or concurrent jurisdiction. To be sure, many courts and commentators have acknowledged the statements in *Blumenstock, Freeman,* and *General Investment Co.,* without critical analysis. Not once, however, has this court or any court held, after canvassing the legislative history, parsing the specific words used in the statute, and applying the precedents on concurrent jurisdiction, that a litigant like Service Center could not seek damages in the state courts for violation of the Sherman Act. Yet to so hold would eliminate the forum shopping that has occurred in this case, the duplication of litigation that is demonstrated in this case and in *Vendco, supra,* and the exclusion of State antitrust claims from state courts that has, in fact, occurred because of the exclusive jurisdictional rule. If Sherman Act claims may be joined with State antitrust claims in the courts of the states, the judgments resulting may, as often as not, ultimately be grounded upon the State law claims; a result quite desirable but all but impossible under the exclusive jurisdiction that is now assumed.

This Court should grant certiorari and consider whether the statute intended concurrent jurisdiction, and whether both antitrust enforcement and judicial economy will be served by concurrent jurisdiction.

MICHAEL J. MEEHAN
P.O. Box 2268
Tucson, Arizona 85702
Attorney for Petitioner

OCTOBER, 1978